In these two cases the Supreme Court of Pennsylvania has totally ignored the law of cases analogous to trade-marks—the law which restrains the fraudulent imitation by one man of the distinctive marks, etc., adopted by another to distinguish his goods—and that although this law is firmly established elsewhere by the Courts of highest authority in England and in this country. If the Court had discussed this principle of law carefully and shown that an advanced public policy demanded that the Pennsylvania Court should refuse to follow the decisions of the other Courts, one would sympathize with its stand. But there is no such discussion in the opinion in these cases.

"Whether trade rivalry shall be open and fair, so that each may be stimulated to his best endeavor in knowledge that his exertions will bring him to the full the honor and profit which are his due, or whether fraud, which knows how to evade definite rules, shall reap the fruits of honest labor and hardly won reputation, is within the discretion of the Court:" G. D. Cushing, Esq., in the Harvard Law Review for Feb., 1891, p. 332. It is respectfully submitted that in these cases the Pennsylvania Court has misused its discretion and taken a wrong stand, and that these two decisions are much to be deplored, for it is difficult to see how their effect will not be to encourage one branch of commercial dishonesty.

WILLIAM WHARTON SMITH.

Supreme Court of Oregon.

OREGON *ex rel.* EVERETT *v.* BOURNE.

Decided November 2, 1891.

SYLLABUS.

Where a witness whose testimony is required in a cause pending in a court of justice is within the territorial jurisdiction of a foreign Court, it is the duty of the foreign Court, when properly requested so to do by the Court in which the suit is pending, to require the attendance of the witness before a regularly commissioned officer, and there to compel him to answer such interrogatories as have been propounded.

The jurisdiction of the foreign Court in such cases is based upon that principle of the law of nations which requires the courts of different countries to assist each other for the furtherance of justice, and such jurisdiction may be exercised independently of local law.

Therefore when a Circuit Court in Oregon, in compliance with letters rogatory issued out of a Superior Court in Massachusetts, ordered the witnesses designated in the letters to appear before a commissioner, which order the witness disobeyed:

Held, that the Court below was justified in committing the refractory witness for contempt, and imprisoning him till he should comply with the order.

The authority to compel attendance being a judicial power is conferred upon the Circuit Courts by that clause in the Constitution of Oregon (Art. VIII, Sec. 9) which vests in the Circuit Courts all the judicial power of the State not vested by the Constitution or laws consistent therewith exclusively in some other Court.

STATEMENT OF THE CASE.

The following is a copy of the *dedimus potestatem* issued out of the Superior Court of Suffolk, Massachusetts, authorizing the taking of the deposition of Jonathan Bourne, Jr.:

COMMONWEALTH OF MASSACHUSETTS.

To any commissioner appointed by the Governor of said Commonwealth of Massachusetts, or to any justice of the peace, notary public or other officer legally empowered to take depositions or affidavits in the State of Oregon,

Greeting:

Assured of your prudence and fidelity, we do by these *presents* appoint and empower you to take the deposition of Jonathan Bourne, Jr., of Portland, in said State of Oregon, to be used in a suit now pending in our Superior Court, between Annie B. Everett as plaintiff and John Stetson, Jr., as defendant; and, on certain days to be by you appointed, to cause the deponent to come before you, and him carefully examine, on oath or affirmation, in answer to several interrogatories hereto annexed; and reduce the examination or cause the same to be reduced to writing in your presence; and after such deposition shall have been reduced to writing, it shall be carefully read to or by deponent, and shall then be subscribed by him. You shall permit neither party to attend at the taking of the deposition, either himself or by any attorney or agent, nor to communicate by interrogatories or suggestions with the deponent whilst giving his deposition in answer to the interrogatories annexed to this commission. And you shall take such deposition in a place separate and apart from all other persons, and permit no person to be present at such examination except the deponent and yourself and such disinterested person (if any) as you may think to appoint as clerk to assist you in reducing the deposition to writing. And you shall put the several interrogatories and cross-interrogatories to the deponent in their order, and take the answer of the deponent to each, fully and

clearly, before proceeding to the next, and not read to the deponent nor permit the deponent to read a succeeding interrogatory until the answer to the preceding has been fully taken down. Of this, our writ, with your doings by warrant of the same, you will make return under seal unto our said Court with all convenient expedition.

Witness the Honorable Albert Mason, Chief Justice of our said Court, and the seal thereof of our city of Boston, on the twenty-first day of November, in the year of our Lord one thousand eight hundred and ninety.

JOSEPH A. WILLARD, *Clerk.*"

On the twenty-seventh day of June, 1891, a paper was served on the appellant, of which the following is a copy:

"SUPERIOR COURT, NOVEMBER, 1890.

ANNIE B. EVERETT, Plaintiff,
v.
JOHN STETSON, Defendant. } Suffolk, *ss.*

To Jonathan Bourne, Jr.:

IN THE NAME OF THE STATE OF OREGON.

The undersigned notary public, having been duly designated and appointed by the Superior Court of Suffolk County, Massachusetts, to take your testimony in a case now pending in said Court, wherein Annie B. Everett is plaintiff, and John Stetson, Jr., is defendant, now, therefore, you are hereby commanded to appear before the undersigned commissioner, at his office, Room No. 11, in the First National Bank Building, on the southeast corner of First and Washington Streets, in the city of Portland, county of Multnomah, State of Oregon, on the thirtieth day of June, 1891, at 9 o'clock in the forenoon of said day, to give evidence in the above-entitled cause on the part of the plaintiff.

Witness my hand and seal this twenty-seventh day of June, 1891.

[Notary Seal] A. C. EMMONS,
Notary Public and Commissioner."

Thereafter on the fifth day of August, 1891, Bourne having refused to appear before the commissioner, the Superior Court of Suffolk, Massachusetts, issued letters rogatory, requesting the

Circuit Court of Multnomah County to lend it assistance, and cause Bourne to appear before the commissioner.

On the seventeenth day of September, 1891, the Circuit Court of Multnomah County, Oregon, ordered the clear of the following writ:

"In the Circuit Court of the State of Oregon, for the County of Multnomah.

STATE OF OREGON, } ss.
COUNTY OF MULTNOMAH, }

In the name of the State of Oregon:

Whereas, a commission was duly issued out of the Superior Court for Suffolk County, Massachusetts, addressed to A. C. Emmons, Esq., a notary public for the State of Oregon, to take the deposition of Jonathan Bourne, Jr., of Portland, in this State, to be used in a suit pending in said Superior Court between Annie B. Everett as plaintiff and John Stetson, defendant, upon interrogatories and cross-interrogatories to be propounded to said witness.

And whereas said Bourne was duly notified and summoned to appear before said notary public, commissioner, and give answer to said interrogatories and cross-interrogatories to be propounded to said witness, and whereas said Superior Court of said Suffolk County has requested us by proper and usual process of our Court to cause said Jonathan Bourne, Jr., to appear before said A. C. Emmons, Esq., commissioner, at a time and place to be by us fixed, for examination on oath or affirmation to said interrogatories to said commission annexed, and that we cause his deposition to be committed to writing and returned, and duly closed and sealed up and returned to said Court; and that we afford our aid in the examination of said witness by said commissioner upon said commission, and offering to do the same for us in a similar case when desired: Now, therefore, we command you that you summon the said Jonathan Bourne, Jr., to appear before said A. C. Emmons, Esq., notary public, commissioner aforesaid, upon Monday, the twenty-first day of September, 1891, at 10 o'clock A.M., and at such further time or times to which the taking of said deposition may be adjourned by said commissioner at his office in the city of Portland, in the First National Bank Building, cor-

ner First and Washington Streets, then and there to testify in said cause in answer to said interrogatories to be propounded to him under said commission, and that you return this writ with your doing herein to this Court.

Witness the seal of said Court and the hand of the clerk thereof affixed at Portland, Oregon, on the seventeenth day of September, 1891.

[Seal of Circuit Court]

JNO. R. DUFF, *Clerk*,
By V. A. FRYER, *Deputy*."

This writ was duly served on the appellant in said city of Portland. On the twenty-fourth day of September, 1891, proof by affidavit was duly submitted to said Circuit Court of the service of said writ and of the non-attendance of said witness at the time and place specified.

Thereafter and on the same day said Court made the following order:

"In the Circuit Court of the State of Oregon for the County of Multnomah.

THE STATE OF OREGON, Plaintiff,
v.
JONATHAN BOURNE, JR., Defendant.

And now this day the affidavit of A. C. Emmons, Esq., having been filed in this Court in the matter entitled: 'In the matter of letters rogatory from the Superior Court of Suffolk County, Massachusetts, in the case of *Annie B. Everett* v. *John Stetson, Jr.*, pending therein, and it being shown to the Court by said affidavit that the above-named Jonathan Bourne, Jr., had disobeyed the process of this Court duly served upon him, requiring him to appear and testify before said A. C. Emmons, notary public, as commissioner, under commission from the Superior Court of Suffolk County, Massachusetts, in said case of *Everett* v. *Stetson* pending therein, by failing to appear before said commissioner at the time and place named in said process upon motion of Annie B. Everett by W. M. Gregory, her attorney. It is therefore ordered that said Jonathan Bourne, Jr., be required to be and appear before this Court at 1.30 o'clock P.M. of this day, or if service hereof be not so soon made upon him, then forthwith upon service hereof, then and there to show cause why he should not be arrested to an-

swer for contempt of this Court in disobeying the lawful process of this Court as above mentioned duly served upon him. It is further ordered that a duly certified copy of this order be forthwith served upon said Jonathan Bourne, Jr.

Dated September 24, 1891.

E. D. SHATTUCK, *Judge.*"

Bourne appeared in said court, pursuant to said order, and filed an answer in substance as follows:

That in failing to appear and testify before A. C. Emmons, Esq., notary public, commissioner appointed under the commission issued by the Superior Court of Suffolk County, State of Massachusetts, to take the deposition of said Bourne as set forth in said order, the said Bourne disclaims any intention of disrespect against this Court or its officers.

And further, answering said order, said Bourne alleges and says:

"That this Court has no jurisdiction of the person of said Bourne under this proceeding, and that this Court has no jurisdiction in the above-entitled matter, and that this Court has no right of jurisdiction to punish said Bourne or to adjudge him in contempt for failing, neglecting or refusing to appear before said commissioner as a witness on Monday, the twenty-first day of September, 1891, at 10 o'clock A.M., or at any other or further time, at the office of said commissioner, at the city of Portland, corner of First and Washington Streets, or at any other place, or to testify in said cause of *Everett* v. *Stetson*, or to answer to interrogatories to be propounded to him under said commission in said cause of *Everett* v. *Stetson.*"

This answer was demurred to, which demurrer was sustained by the Court, and thereupon said Court entered the following judgment:

"That the defendant, Jonathan Bourne, Jr., be and he is hereby committed to the jail of Multnomah County, State of Oregon, for contempt of this Court, in disobeying the lawful process of this Court, requiring him to appear before said A. C. Emmons, Esq., notary public, commissioner, as herein recited, and that he be there kept in close confinement until he be ready to and do appear before said commissioner to testify as required by said process of this Court."

The appeal is from this judgment.

Fred. V. Holman, for appellant.

W. M. Gregory, for respondent.

STRAHAN, C. J. It sufficiently appears from the foregoing statement that the Superior Court of Suffolk County, Massachusetts, where the action of *Annie B. Everett* v. *John Stetson, Jr.*, is pending, tried through the usual instrumentality of a commission on a *dedimus potestatem* to obtain the evidence of the witness, and failed. Thereafter letters rogatory were issued, under which the Circuit Court of Multnomah County has taken the proceedings which have resulted in this appeal.

The real question here is one of jurisdiction. At the outset it is conceded that there is no statute in this State expressly and in so many words conferring jurisdiction on the Circuit Courts of this State in such cases. The only statute having any bearing on the subject is Section 790, Hill's Code, which provides:

"The subpœna is issued as follows: . . . (2) To require attendance before a commissioner appointed to take testimony by a Court of the United States, or a territory thereof, a sister State, or any foreign country, by any clerk of a Court of record, in places within the jurisdiction of such Court."

By this section a clerk of a Court of record is authorized to issue a supœna, requiring the attendance of a witness before a commissioner appointed to take testimony by a Court of a sister State, and the subpœna, when issued, is the process of the Court whose clerk issued it, and not of the clerk. But counsel takes the objection here for the first time, so far as the record discloses, that the paper issued by the clerk of the Circuit Court of Multnomah County, and served upon Bourne, is not *a subpœna*, and therefore he was not bound to obey it; and he further insists that as no statute expressly confers jurisdiction on the Circuit Court in such cases, it is without authority.

These objections may be considered together. This question is one involving the comity of States, grows out of necessity, and is recognized by the law of nations. In discussing it, therefore, no narrow or merely technical view of the law is permissible. The Constitution of the State, Art. VII, Sec. 9, vests in the Circuit Courts all the judicial power of the State not vested by the Constitution or laws consistent therewith exclusively in some other Court. If the authority to require the attendance of a witness before a commissioner appointed by a Court of a sister State is a judicial power, and not being vested exclusively in some other Court, then the same belongs to the Circuit Courts, and even if the Constitution were silent upon the

subject we think the result would be the same. In speaking of this method of obtaining evidence, 1 Greenleaf's Ev., Sec. 320, says: ". . . This method of obtaining testimony from witnesses in a foreign country has always been familiar in the Courts of Admiralty; but it is also deemed to be within the inherent power of all courts of justice. For by the law of nations, courts of justice of different countries are bound mutually to aid and assist each other for the furtherance of justice; and hence, when the testimony of a foreign witness is necessary, the Court before which the action is pending may send to the Court within whose jurisdiction the witness resides a writ, either patent or close, usually termed a letter rogatory, or a commission *sub mutuæ vicissitudinis obtentu ac in juris subsidium*, from those words contained in it."

The same principle is stated in Weeks on Depositions, Sec. 128, and many authorities cited. And the practice under such letters is stated and discussed in Wharton's Conflict of Laws, Sec. 722 *et seq.*; 3 Wharton's International Law Digest, Sec. 413 *et seq.*; *Nelson* v. *U. S.*, 1 Pet. C. C. R. 235; *Kuehling* v. *Liberman*, 9 Phila. R. 160; *In re Jenckes*, 6 R. I. 18. These authorities sufficiently show that the matter under consideration is one of judicial cognizance. It appertains to the administration of justice in its best sense, and its exercise is now common and unquestioned amongst civilized nations. It is true the duty may not be imposed by positive local law, but it rests on national comity, creating a duty that no State could refuse to fulfil without forfeiting its standing amongst the civilized States of the world.

Aside, then, from the statute quoted above, we think the Circuit Court of Multnomah County had jurisdiction over this case; but the statute, no doubt, was designed to cover such cases. The clerk of the Court, in issuing a writ of subpœna or other writi, only exercises his appointed functions under the law; but the writ, when issued, is the writ of the Court authenticated by ts seal and over which it has jurisdiction. All writs so issued protect the officer executing them, and the Court has power to prevent all abuses growing out of their use.

As a necessary incident to this it may punish all disobedience or resistance to its process and orders. This power inheres in the Court, whether conferred by express statute or not.

It was finally argued that the writ which the clerk issued, and

which was served on the appellant requiring him to appear and submit to an examination, was not a subpœna.

Two answers may be made to this objection: The first is that no such objection was taken in the Court below. The appellant did not there object that the writ was illegal or one that he was not bound to obey because the writ was defective, but his objection went to the jurisdiction of the Court. The one now made goes to the means or manner of its exercise. But whether taken here or in the Court below, the objection could not be sustained. For all the purposes of this proceeding, the writ which was served upon the appellant was a subpœna. It is true, it is not in the form in common use in the Courts of this State, but it required the attendance of a witness (Hill's Code, Sec. 789), and that is sufficient. It was finally objected by the appellant that the Court in Massachusetts had no authority to issue the letters rogatory. The ground of this objection is not clear to us, but we are unable to find any satisfactory foundation upon which it could be placed. We cannot review the action of that Court or call in question its jurisdiction over the case pending before it. Any excess of authority or irregularity in its exercise must be made in that Court, and not here. It is sufficient for us to know that it has by letters rogatory asked the aid of one of the Courts of this State, in obtaining the testimony of a witness domiciled here, in a case pending before it and over which it has assumed jurisdiction.

We find no error in the judgment appealed from, and the same is therefore affirmed.

Letters rogatory, when to issue and practice relative thereto: 2 Wait's Practice 682; Wharton's Conflict of Law, secs. 722–732, 2 Ed.; Greel. Ev., sec. 320; *Lurnley* v. *Gee*, 3 Ellis & Black. 114; *Clay* v. *Stephenson*, 7 Ad. & Ellis 185; *Bolin* v. *Melliden*, 5 Eng. L. & Eq. 387, 3d Ed. 585; *Ponsford* v. *O'Connor*, 5 M. & W. 573; *Fischer* v. *Izataray*, 1 El., Black. and El. 321; *Pole* v. *Rogers*, 3 Bing. N. C. 780; *Lincoln* v. *Battelle*, 6 Wend. 475; *Canjole* v. *Ferrie*, 23 N. Y. 93.

Contempt of Court. See AMERICAN LAW REGISTER, Vol. 20, pages 81–93, 145–159, 217–225, 289–304, 361–373, 425–436.

Statutes conferring upon Courts of record power to punish for contempt in certain cases do not take away its common law power to punish for contempt: *People* v. *Wilson*, 64 Ill. 195.

Contempt before referees: *Burt* v. *Pyle*, 89 Ind. 398; *In re Remington*, 7 Wis. 643; *Haight* v. *Lucia*, 36 Wis. 355; *Seely & Johnson*, 6 Abb. Pr. 217; *Ex parte Doll*, 7 Phil. (Pa.) 218; *Ex parte Kreiger*,

7 Mo. App. 367; *La Fontaine* v. *Southern Underwriters' Association*, 83 N. C. 132; *McCartan* v. *Van Syckel*, 10 Bosw. N. Y. 694; *Heerdt* v. *Wetmore*, 2 Robt. 697.

Contempt of one Court is not punishable in another: *State* v. *Tipton*, 1 Blackf. (Ind.) 166; *Kernodle* v. *Cason*, 25 Ind. 362; *Phillips* v. *Welch*, 12 Nev. 158; *Rex* v. *Burchett*, Str. 567; *People* v. *County Judge*, 27 Cal. 151; Lord Mayor's Case, 3 Wils. 188, 201; *Morris* v. *Whitehead*, 65 N. C. 637; *McLaughlin* v. *Janney*, 6 Gratt. (Va.) 609; *Smith* v. *Caldwell*, Sneed (Ky.) 341; *Johnston* v. *Com.* 1 Bibb. (Ky.) 598; *Penn* v. *Messinger*, 1 Yeates (Pa.) 2; *Ex parte Smith*, 28 Ind. 47; *Morrison* v. *McDonald*, 21 Me. 550; *Watson* v. *Williams*, 36 Miss. 331; *State* v. *Mathews*, 37 N. H. 450; *Gates* v. *M'Daniel*, 4 Stew. & P. (Ala.) 69; *Ex parte Chamberlain*, 4 Cow. (N. Y.) 49; Fillinghast, *Ex parte*, 4 Pet. (U. S.) 108.

How contempt proceedings should be entitled: *Bronson's Case*, 12 Johns. (N. Y.) 460; *Haight* v. *Turner*, 2 Johns. (N. Y.) 371; *Fox* v. *Cole*, 6 T. R. 640; *Hollis* v. *Brandon*, 1 Bos. & P. 36; *Green* v. *Redshaw*, 1 Bos. & P. 327; *Clarke* v. *Cawthorn*, 8 T. R. 321; *Rex* v. *Lawrence*, Sayer 218; *Rex* v. *Jones* and *Rex* v. *Robinson*, 1 Strange 704; *Rex* v. *Pierson*, And. 313; *Rex* v. *Harrison*, 6 T. R. 60; 6 T. R. 641; *Beavan* v. *Beavan*, 3 T. R. 60; 7 T. R. 438, 529; *Fares* v. *Dieman*, 7 T. R. 661; *Fell* v. *Jadwin*, 3 Johns. (N. Y.) 448; *Phelps* v. *Hall*, 5 Johns. (N. Y.) 367; *U. S.* v. *Wayne*, 1 Wall. (U. S.) C. C. 134; *People* v. *Ferris*, 9 Johns. (N. Y.) 160; *Folger* v. *Hoagland*, 5 Johns. (N. Y.) 235; *Stafford* v. *Brown*, 4 Paige (N. Y.) 360; *1st Cong. Church* v. *Muscatine*, 2 Iowa 69; *Re Rea*, 14 Cox Cr. Cas. 139; *Brown* v. *Andrews*, 1 Barb. (N. Y.) 227; *Fisher* v. *Hayes*, 6 Fed. Rep. 63; *Winslow* v. *Nayson*, 113 Mass. 411; *Nelson* v. *Ewell*, 2 Swan. (Tenn.) 271; *McKenzie* v. *McKenzie*, 11 Eng. L. & Eq. 41; *People* v. *Craft*, 7 Paige (N. Y.) 325; *State* v. *Harper's Ferry Bridge Co.*, 16 W. Va. 864; *Haight* v. *Lucia*, 36 Wis. 355.

Where a witness under examination before an officer not having power to punish for contempt refuses to answer a proper question, the officer should report to a Court having jurisdiction, and ask it to compel an answer or punish the contumacious witness: *Keller* v. *B. F. Goodrich Co.*, 117 Ind. 556.

On the principle of comity the Courts of the State, where a deposition is taken to be used in another State, will exercise their authority when appropriately invoked and will assist an officer within their jurisdiction when properly asked to secure answers to competent questions: *Keller* v. *B. F. Goodrich Co.*, 117 Ind. 556.

A commission rogatory for the examination of a witness in a foreign country will not issue unless it appear that a difficulty exists in the execution of a commission to take testimony in the ordinary form: *Froude* v. *Froude*, 3 N. Y. Supreme Ct. 79.

Members of Congress are not exempt from service or obligation of subpœna in a criminal case, and letters will not be addressed by the Court to them requesting to attend as witnesses. If after service of subpœna the members do not attend, a satisfactory reason may appear to the Court to justify it: *United States* v. *Cooper*, 4 Dall. 341.

The same power may be exercised by the Court, in which the

action wherein the deposition was taken is pending, to punish for contempt, provided the commissioner, instead of punishing for contempt, reports the facts to the Court: *State ex rel. Lanning* v. *Lonsdale*, 48 Wis. 348.

When the officer taking the deposition of a witness to be used in an action pending in Court of record of this State, reports to the Court in which such action is pending that the witness has refused to answer certain interrogatories propounded to him, the Court should, on application of the aggrieved party, grant an order that the witness show cause why he should not be required to answer such interrogatories. On the return of the order, if the witness does not admit his refusal to answer, proper interrogatories in that behalf should be served upon him. If it appear by his admission, or by his answer to the interrogatories, or by proof, that he has so refused, the Court will decide whether he ought to answer the questions which he refused to answer; and if it is held that he ought, the Court will make an order requiring him to go before the officer and make answer thereto; and in such case the Court in its discretion may impose upon him the costs of the proceeding. For disobedience to such order the Court should, on proper proceedings, punish the witness as for a criminal contempt: *State ex rel. Lanning* v. *Lonsdale*, 48 Wis. 348.

The prohibition of execution of commissions in several countries to examine witnesses has led to the adoption of letters rogatory or requisitory, which are in fact applications in the name of one State, through its Courts of Justice, to another State, to permit and assist in obtaining of testimony: *Republic of Mexico* v. *Arrangois*, 3 Abb. Pr. (N. Y.) 471.

A witness before a grand jury refusing to be sworn, or who behaves disrespectfully, may be lawfully detained and taken before the Court in order to obtain its aid and direction: *Heard* v. *Pierce*, 8 Cush. (Mass.) 338.

Only Federal Courts and State Courts invested with general common law powers, except specially authorized by statute, have power to aid foreign Courts in the execution of their commission or receive letters rogatory: *Petition to aid Foreign Commission*, 5 Sandf. (N. Y.) 674.

The examination of a witness before trial by a commissioner by authority of a statute is strictly a statutory proceeding; and the officer conducting it, whether a judge at chambers, the county judge or a court commissioner, has no power to punish for such contempt, unless specially conferred by the statute: *Stuart* v. *Allen et al.*, 45 Wis. 158; *In re Remington*, 7 Wis. 643; *Appleton* v. *Appleton*, 50 Barb. 486; *People* v. *Brennan*, 45 Barb. 344.

The Court will require, before aiding a commissioner to compel a witness to answer an interrogatory propounded, that the question be relevant and material to the case or hearing: *In re Judson*, 3 Blatchford 148.